(3)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

ADAM MIRANDA,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

		Pages
QUESTIONS PRESENTED		1
BRIEF OF RESPONDENT IN OPPOSITION JUDGMENT BELOW		1
JURISDICTION		2
CONSTITUTIONAL PROVISIONS INVOLVED		2
STATEMENT OF THE CASE		2
REASONS WHY PETITION SHOULD BE DENIED		5
I	EVIDENCE OF OTHER OFFENSES WAS PROPERLY PRESENTED TO AND CONSIDERED BY THE JURY	5
II	THE CALIFORNIA SUPREME COURT PROPERLY APPLIED THE FEDERAL CONSTITUTIONAL HARMLESS ERROR STANDARD TO THE INSTRUCTIONAL ERROR IN THE INSTANT CASE	12
III	PETITIONER WAS DEPRIVED OF NO FEDERALLY GUARANTEED RIGHT BY THE CALIFORNIA SUPREME COURT'S DETERMINATION THAT THE REASONABLE DOUBT STANDARD'S APPLICABILITY TO PENALTY PHASE EVIDENCE RESTS UPON STATE GROUNDS ALONE	17
CONCLUSION		21

TABLE OF AUTHORITIES

Cases	Pages
Chapman v. California (1967) 386 U.S. 18	16
Furman v. Georgia (1972) 408 U.S. 238	6,7
Godfrey v. Georgia (1984) 46 U.S. 420	7
Gregg v. Georgia (1976) 428 U.S. 153	5
Hicks v. Oklahoma (1980) 447 U.S. 343	17,19
In re Winship 397 U.S. 358, 361	10, 12
Lockett v. Ohio (1978) 438 U.S. 586	7
Morrissey v. Brewer (1972) 408 U.S. 471	10, 12
Pope v. Illinois (1987) ____U.S.____ 107 S.Ct. 1918	14,15,16
People v. Robertson (1982) 33 Cal.3d 21	14, 15, 17, 19
People v. Terry (1964) 61 Cal.2d 137	18
Proffitt v. Florida (1976) 428 U.S. 242	5
Pulley v. Harris (1984) 104 S.Ct. 871	5, 6
Rose v. Clark (1986) 106 S.Ct. 3101	15
State v. Bartholomew (1984) 101 Wash. 2d 631	7
State v. McCormick (1979) 272 Ind. 292	7
Vitek v. Jones (1980) 445 U.S. 480	13,17,19

Statutes

Calif. Pen. Code, § 190.3	6,7,9

QUESTIONS PRESENTED

1. Whether the introduction of evidence of uncharged offenses as provided by statute in California for the purpose of penalty assessment violates any federal right;

2. Whether any federal constitutional provision requires the giving of an instruction in the penalty phase of a capital case, after guilt and the existence of a "special circumstance" making the defendant eligible for the penalty of death have already been determined by the jury, requiring that evidence of uncharged crimes introduced at the penalty phase meets the reasonable doubt standard;

3. What effect, if any, the existence of the requirement, under California case law interpreting prior death penalty statutes, of instruction on the reasonable doubt standard as applied to other offense evidence during penalty determinations has on the due process and equal protection aspects of question two above.

NUMBER 87-6746

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ADAM MIRANDA,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

JUDGMENT BELOW

Petitioner, Adam Miranda, seeks review of an opinion of the California Supreme Court, filed on November 12, 1987, in Case No. 22787, associated with habeas corpus petition No. 25350, reported at 44 Cal.3d 57, 244 P.2d 1127, and set forth as appendices "A" and "B" attached to the Petition for Writ of Certiorari. Petitioner's Petition For Rehearing in the California Supreme Court appears as Appendix "C" attached to the Petition.

Petitioner was found guilty by a jury of first degree murder. It was also found that petitioner was armed with and personally used a firearm and that the murder was committed during the attempted commission of a robbery within the meaning of California Penal Code section 190.2(a)(17), establishing petitioner's eligibility for the death penalty. Petitioner was also found guilty of assault with intent to commit murder, and first degree burglary. At the penalty phase of petitioner's trial, the jury fixed the penalty at death. The California Supreme Court judgment affirmed the trial court judgment in its entirety including the penalty of death.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner invokes the Fifth and Eighth Amendments to the United States Constitution as well as a portion of section 1 of the Fourteenth Amendment to the United States Constitution, as set forth at page 2 of the Petition.

STATEMENT OF THE CASE

In the early morning hours of September 27, 1980, petitioner and his partner in crime, one Arthur Gonzalez, entered a convenience store at Eagle Rock Boulevard in Los Angeles County, California. Virtually all of the movements conducted by petitioner and his partner, Gonzalez, were recorded by a video camera located in the store. Shortly after entering the store, the two men approached the sales counter which was manned by the murder victim, Gary Black and fellow worker Kelly Chandler. Petitioner produced a revolver from his waistband and demanded money. Before the demand could be complied with, however, and without apparent provocation, petitioner began firing and both Mr. Chandler and Mr. Black were struck in the upper body. (R.T. pp. 2479-2523.)[1/] An autopsy performed upon the body of Gary Black on September 29, 1980 revealed that death was caused by gunshot wounds to the chest. (R.T. pp. 2862-2871.)

Petitioner was arrested at a bowling alley on Eagle Rock Boulevard in Los Angeles County on October 3, 1980. Appellant was taken into custody after a struggle with arresting officers during which he attempted to draw a handgun, in all likelihood the murder weapon, from his pocket. Also taken from petitioner at the time of the arrest was a letter addressed to

1. The "R.T." designates the Reporter's Transcript in the instant case, which was part of the record on appeal before the California Supreme Court.

his mother which contained incriminating information. (R.T. pp. 2679-2694.) In the letter, petitioner referred to himself as "the killer" and drew a small "happy face" following the words. He maintained that this reference in his letter to his mother was a joke. (R.T. pp. 3224-3248; 3337.) During the guilt phase of the trial, petitioner stated that the reason he fired at the two unarmed and defenseless store clerks was that one of them had been rude to him and his partner. He even went so far as to indicate that Mr. Chandler, the individual who survived, invited petitioner to shoot him and that petitioner simply obliged by firing the shots. (R.T. pp. 3209-3213.)

Evidence at the penalty phase of petitioner's trial was restricted to testimony concerning the murder of one Robert Hosey on September 17, 1980. Coroner's testimony revealed that Mr. Hosey died from multiple stab wounds in the face and neck. At least fifteen different wounds had been inflicted upon the upper portion of the victim's body. (R.T. pp. 3811-3829.) Patricia Torres was called as a witness for the People but experienced a marked lapse of memory concerning the murder of Mr. Hosey. (R.T. pp. 3830-3878.) A previous sworn statement by Miss Torres was taken at the Los Angeles County District Attorney's Office on September 23, 1980. In this earlier statement, Miss Torres indicated that she had been in front of the building in which another individual, Joe Saucedo, lived with another woman. Miss Torres saw a black man, in all likelihood, Mr. Hosey, brought to Saucedo's apartment by Saucedo and one Tomas Martinez on September 12. She gained the impression from the manner in which Mr. Hosey had been brought to the area that he had "ripped off" Mr. Martinez. (R.T. pp. 4049-4065.)

Miss Torres observed a struggle involving Mr. Hosey, who somehow got free and fled. She saw petitioner with a knife earlier in the evening. Miss Torres believed that petitioner and one or two other individuals, probably Saucedo and Martinez,

followed Mr. Hosey. Martinez and Saucedo were in a car and appellant was on foot. Later that evening, Miss Torres observed Saucedo again with his hand wrapped in a blood-soaked shirt. (R.T. pp. 4049-4074.) Six days before relating the above statement, Miss Torres gave another, this time to police detective Louis Berman. This statement essentially coincided with that given later. During this interview, Miss Torres indicated that she was fearful for her safety. (R.T. p. 4103.)

Joe Saucedo had been acquainted with petitioner for approximately four years as of the time of trial. On September 12, 1980, Saucedo and Martinez attempted to purchase phencyclidine in a housing project to which they had driven. They encountered Mr. Hosey in that area and after some problems developed with the attempted purchase the two men drove Mr. Hosey back to Saucedo's residence. One of the people present when they arrived was petitioner. (R.T. pp. 3929-3938.)

At Saucedo's residence, a number of individuals harassed Mr. Hosey concerning the imitation narcotics he attempted to sell to Martinez and Saucedo. Saucedo extracted a knife from Mr. Hosey's back pocket and conveyed it to petitioner at petitioner's request. When the altercation turned physical, Mr. Hosey escaped and began running down the street. Petitioner followed Mr. Hosey, while Saucedo and two other men reentered Saucedo's car. Saucedo saw Mr. Hosey knocking at the door of a residence with appellant close behind. Petitioner was tripped by Saucedo but then reached Mr. Hosey and began stabbing him. While petitioner was stabbing Mr. Hosey to death, Mr. Hosey was begging for his life. Even after Mr. Hosey had fallen into a sitting position, petitioner grabbed him by the hair and continued stabbing him. (R.T. pp. 3939-3964.)

REASONS WHY PETITION SHOULD BE DENIED

I

EVIDENCE OF OTHER OFFENSES WAS PROPERLY PRESENTED TO AND CONSIDERED BY THE JURY

Petitioner argues that "any scheme which allows the introduction of evidence of unadjudicated criminal conduct at the sentencing hearing of a capital trial runs contrary to the heightened reliability called for in such proceedings, and is violative of the Eight and Fourteenth Amendments." (Petn. For Writ of Cert., p. 5.) Petitioner concedes at page 5 of the petition that the California Supreme Court has rejected this very contention. (Petn. Appendix "A", pp. 50-51.) Respondent submits that the use of such evidence, both in California and elsewhere, in the determination of penalty in capital and other criminal cases is well established and that petitioner has failed to raise anything bordering upon a sound constitutional argument on the basis of which this Court can or should condemn this process now.

Initially, it is quite clear that petitioner's instant claim has already been disposed of by this Honorable Court. In both Gregg v. Georgia (1976) 428 U.S. 153, and Proffitt v. Florida (1976) 428 U.S. 242, capital punishment statutes were approved of by this Court where the statutes at issue contemplated the consideration of other crimes evidence in connection with penalty. (See Gregg v. Georgia, supra, 428 U.S. 165-166, fn. 9; Proffitt v. Florida, supra, 428 U.S. 242, 248-249, fn. 6.) Indeed, in Pulley v. Harris (1984) 465 U.S. 37, 104 S.Ct. 871, this Court specifically approved of the immediate predecessor to the current California death penalty statute. Briefly, the California death penalty scheme operates in much the same way as did the earlier statutory scheme, as follows: At the guilt phase portion of the trial, both a first degree murder conviction and a finding by the jury to the reasonable doubt standard of at least one "special circumstance" is required

before a defendant is subjected to a penalty phase at which the propriety of the death sentence will be determined by the jury, and ultimately confirmed or rejected by the trial court. Within the penalty phase, a specific class of evidence may be received by the jury, or the court if a jury is waived, in order to facilitate the penalty determination. Under the earlier statute, as is the case now, evidence of other criminal activity involving violence or threat of violence may be considered among the aggravating and mitigating circumstances impacting upon the penalty decision. (See Calif. Pen. Code, § 190.3.) As noted in Pulley v. Harris, supra, additional safeguards, including the trial court's review of a jury's return of a verdict of death and automatic review by the California Supreme Court, are included within the death penalty scheme.

This Court, in Pulley v. Harris, supra, examined this statutory configuration and its procedural application at length, and came to the conclusion that by requiring a finding of a special circumstance within the guilt phase and by specifically limiting the factors which may be considered in the penalty phase, the California scheme comports with the guiding criteria enunciated by this Court in Furman v. Georgia (1972) 408 U.S. 238. (Pulley v. Harris, supra; 104 S.Ct. 880-881.) Respondent submits that absolutely nothing put forward by petitioner in the case law emanating from this Honorable Court in the four years since the decision in Pulley v. Harris, supra, undermines in the slightest the result in that case or its applicability to the instant situation.

Respondent further submits that petitioner's brief resort to the procedural law of several of our sister states is totally unavailing and essentially irrelevant to the analysis at hand. It is entirely clear from a perusal of this Court's death penalty cases that a uniform and nationally compelled set of rules and procedures in capital adjudication was never intended.

Rather, this Court has required the states to navigate the narrow straits between the rocks of arbitrary imposition of the death penalty which offends due process principles (Godfrey v. Georgia (1980) 446 U.S. 420; Furman v. Georgia, supra, 408 U.S. 238), and the shoals of mechanical or automatic imposition of capital punishment offensive to the Eighth Amendment. (Lockett v. Ohio (1978) 438 U.S. 586.) However, within these real and substantial limitations, there remains sufficient open sea for procedural variation among the statutory schemes adopted by those states which impose capital punishment.

It is for this reason, then, that petitioner's brief and inadequate presentation with respect to the six or seven states which allegedly preclude other crimes evidence in capital cases is of little or no value with respect to the instant contention. Since the various state statutory schemes may legitimately be, and frequently are, widely disparate in terms of what is offered to the trier of fact and when and how such evidence is received, state determinations concerning admissible evidence are simply adrift unless anchored to the particular procedures utilized in a particular state. For example, in State v. Bartholomew (1984) 101 Wash. 2d 631, 683 P.2d 1079, cited by petitioner at page 6 of the Petition, the burden of proof at the penalty phase was, under Washington law, highly weighted in favor of the death penalty. (See 683 P.2d 1170, 1181.) California, by way of contrast, leaves to the jury's discretion the determination as to whether "the aggravating circumstances outweigh the mitigating circumstances" in which case the jury "shall impose a sentence of death . . . ." (Calif. Pen. Code, § 190.3.)

Likewise, a reading of State v. McCormick (1979) 272 Ind. 292, 297 N.E.2d 276 reveals that the other crimes evidence decried in that case was not of the aggravation/mitigation type currently being challenged, but rather operated in a manner much

like the special circumstance provided for under the California scheme, in that such evidence determined a defendant's eligibility for capital punishment in Indiana.2/ Again, it is because of these significant variations in the structure of the capital punishment statutes of the several states that an indication to the effect that a particular state does nor does not permit the admission of "unadjudicated offenses . . . at the sentencing phase of trial" has little or no meaning in the instant context. (Petn. p. 6.)

Petitioner argues that the capital defendant "should not be punished for a crime that the state has not proven he committed." (Petn. p. 7.) Likewise, he condemns the "imposition of the death penalty for crimes which have not been reduced to judgment" in terms of a "heightened reliability in capital proceedings." (Petn. p. 7.) Respondent challenges this characterization of the evidence at issue here. Petitioner is not being punished for the murder of Robert Hosey. If petitioner is put to death, it will be for the murder of Gary Black, the murder which was charged, tried and proven, the murder which occurred during the attempted commission of a robbery as charged and proven in the accompanying special circumstance. Petitioner would have this Court denominate the murder of Gary Black as the "triggering offense" in the instant case, but such terminology is deceptive, misleading and false. (Petn. p. 8.) Petitioner further alleges that if he is required to pay his debt to society as determined under the elaborate procedures of the California statutory scheme, then his execution will "be imposed

2. It is significant to note that none of the special circumstances specified within California Penal Code section 190.2 which render a defendant eligible for capital punishment in any way relate to prior criminal conduct not resulting in a conviction. In general, special circumstances enumerated under that section relate to the current crime: its motivation, the nature or status of the victim, or the means used. The only special circumstances involving other criminal acts permit capital punishment to be imposed where the defendant has been convicted of a prior murder or where more than one conviction of murder has occurred in a single proceeding.

on the basis of evidence which may be based on little better than hearsay, innuendo or surmise." (Petn. p. 8.) Again, this assertion is unsound for several reasons.

To begin with, there is no doubt as to petitioner's guilt concerning the murder of Robert Hosey. As petitioner concedes at footnote 2, page 5 of the Petition, he subsequently pled guilty to second degree murder with respect to this killing. As a matter of law, petitioner murdered Robert Hosey, and questions of accuracy, innuendo, surmise, or reliability simply have nothing to do with the instant case. Likewise, the evidence presented at petitioner's penalty phase was substantial concerning the killing of Robert Hosey. Indeed, the California Supreme Court in evaluating an assertion of petitioner's similar to the instant one declared that "there was ample evidence, properly admitted, establishing that defendant had killed Hosey." (Petn. Appendix A, p. 52.) Finally, despite the fact that all of the evidence presented at the penalty phase was directed at the murder of Robert Hosey, the jury had heard, and was entitled to consider, all of the evidence adduced at the guilt phase of petitioner's trial in determining the appropriate penalty. (Calif. Pen. Code, § 190.3(a).) It will be recalled, as noted above, that this evidence included petitioner's attempted armed resistance against arresting officers, his humorous comments on the taking of human life, the total lack of provocation on the part of the victims, and the senselessness of the killing itself.

Nevertheless, petitioner insists that the use of such evidence of other offenses of a violent nature is constitutionally offensive. He alters his mode of attack, however, from an Eighth Amendment to a Fourteenth Amendment due process argument and declares that the process "subjects a defendant to what is effectively a trial without the full panoply of rights afforded by both state and the federal constitutions." (Petn. p. 8.) To the best of respondent's knowledge, the

utilization within the penalty determination process of a convicted individual's prior criminal record is as old as the American Criminal Justice System itself. Routinely, probation reports, certified copies of prior convictions, and the like find their way into the criminal courtroom at the time of sentencing.

As noted in Morrissey v. Brewer (1972) 408 U.S. 471, 481, the mere invocation of the principles of due process does not end an argument, since it must always be determined "what process is due." Immediately thereafter, this Court noted that "due process is flexible and calls for such procedural protections as the particular situation demands." In the landmark case of In re Winship (1970) 397 U.S. 358, 361, this Court insisted that, with respect to the reasonable doubt standard of conviction, at least, the due process boundaries it was defining were specifically limited to proceedings determining "guilt of a criminal charge. . . ." Indeed, in the same case, the fundamental right of trial by jury was held to be inapplicable to juvenile proceedings on the basis of sound policy considerations. Nevertheless, petitioner insists now that he is constitutionally entitled to trial by jury as to penalty, indeed to "the full panoply of rights," which attach to adjudications of guilt. (Petn. p. 8.)

Again, respondent submits that the penalty determination process has never been seen to be part of the adjudicatory mechanism to which this "full panoply of rights" attaches. In virtually every jurisdiction with respect to virtually every type of crime, the sentencing process is carried out by the court alone. Simply because the State of California, in recognition of the seriousness and solemnity attached to the taking of a human life by the state, extends additional protections to the capital defendant does not in the slightest expand his entitlement under the federal charter.

Ultimately, respondent submits that petitioner has totally failed to indicate any unfairness, fundamental or otherwise, connected with the receipt of other crimes evidence. Petitioner was not, as he now claims, burdened by the necessity "of defending new charges of criminal activity before the jury that had just convicted him of first degree murder." (Petn. p. 8.) Rather, petitioner's prior violent act was properly presented to the jury entrusted with the duty of deciding whether he should live or die. Since this information is clearly relevant to the decision which the jury had to render, since it was statutorily permissible within the California scheme, and since no unfair or unreliable procedures were utilized in bringing the information to the jury's attention, no violation of the due process clause, or any other clause of the Constitution occurred.

II

THE CALIFORNIA SUPREME COURT PROPERLY APPLIED THE FEDERAL CONSTITUTIONAL HARMLESS ERROR STANDARD TO THE INSTRUCTIONAL ERROR IN THE INSTANT CASE

While conceding that the California Supreme Court determined that the trial court's failure to give the court-mandated instruction concerning the standard of proof applicable to the receipt of other crimes evidence at the penalty phase constituted merely harmless error, petitioner nevertheless asserts that the instant judgment must be reversed simply because the instruction on burden of proof was not given at trial. It appears that petitioner's argument is predicated primarily upon the assertion that application of the reasonable doubt standard to other crimes evidence is constitutionally compelled. Respondent challenges this facile assumption, but nevertheless asserts that even were it true, petitioner would not be entitled to relief now.

As noted above, the major portion of petitioner's instant argument is devoted to an attempt to demonstrate that due process considerations as developed by this Honorable Court since In re Winship, supra, require the application of the reasonable doubt standard to the receipt of evidence of other crimes at the penalty phase of a capital trial. Respondent submits that this argument proves too much. As noted earlier, the requirements of due process are flexible and vary according to the proceeding under consideration. (Morrissey v. Brewer, supra, 408 U.S. 471, 480-481.) As also noted above, the due process requirement of proof beyond a reasonable doubt has been consistently seen by this Court as applicable only to the determination of "guilt of a criminal charge. . . ." (In re Winship, supra, 397 U.S. 358, 361.) Moreover, as respondent has already discussed, determinations as to sentence, as opposed to adjudications of guilt, have traditionally involved considerations and evidence to

which application of the reasonable doubt standard is impractical, impossible or unnecessary. While it can hardly be contested that, as petitioner claims, the reliability in penalty determination--to the extent to which the term "reliability" may be applied to a process which this Court has recognized to be in large measure discretionary--is of considerable weight, petitioner has utterly failed to demonstrate, or even allege, that he himself was subjected to an arbitrary, capricious, or unreliable penalty determination.

Furthermore, respondent contests petitioner's assertion that he had at stake in his penalty phase trial "an interest of 'transcending value' . . . [i.e.] his liberty. . . ." (Petn. p. 10.) Respondent submits, as this Court has consistently held, that "a valid criminal conviction and prison sentence extinguish a defendant's right to freedom from confinement." (Vitek v. Jones (1980) 445 U.S. 480, 493.) With respect to petitioner's argument, this principle reduces the following observation: petitioner's unconditional right to life and liberty under the United States Constitution was abrogated as a result of his conviction at his guilt trial of first degree murder with attendant special circumstance. All that remained to be determined in the penalty phase was the appropriate punishment for petitioner's offense. Adherence to the constitutionally mandated procedural requirements emanating from this Court and the federal charter at petitioner's guilt phase trial represents California's compliance with those due process requirements which have found expression in the various procedural decisions of this Court. All that remains of petitioner's due process guarantees following his lawful conviction, and petitioner does not challenge the lawfulness of the adjudication of guilt in his Petition For Writ of Certiorari, is the requirement that the state act in a reasonable and fundamentally fair way in

determining and executing sentence. Again, petitioner has not alleged otherwise here.

It should, of course, be borne in mind that the very requirement petitioner now presses upon this Court--i.e. the requirement of proof beyond a reasonable doubt as to other crimes evidence in a penalty phase trial and instruction to that effect to the jury--has in fact been part of the California capital punishment scheme since the holding of the California Supreme Court in People v. Robertson (1982) 33 Cal.3d 21, 655 P.2d 279. As noted by the Supreme Court of California in its opinion in the instant case, the holding in Robertson, supra, was seen to be "an evidentiary one and . . . not constitutionally mandated." (Petn. Appendix A, p. 51.) The court went on to note that the rule in People v. Robertson, supra, "merely serves a foundational purpose requiring a higher standard of proof before evidence of other crimes may be considered by a jury . . . ." (Petn. Appendix, A, pp. 51-52.) Thus, it is clear that the rule which petitioner urges upon this Honorable Court on federal constitutional grounds has already been adopted in California, albeit on state grounds. Even assuming arguendo, then, that which respondent submits has already been refuted--that is assuming that the reasonable doubt standard as to other crimes evidence in a penalty phase determination in California is required under the due process Clause of the Fourteenth Amendment--it is clear that petitioner is unentitled to the relief he seeks.

In Pope v. Illinois (1987) ____U.S._____ 107 S.Ct. 1918, this Court advanced its recent explication of the relationship between jury determinations in criminal matters and appellate review of the judgments resulting from them. At this juncture, respondent would note two observations made in the Pope opinion. First, it was held that since the Illinois statute which grounds the judgment in Pope had already been declared unconstitutional in Illinois, "invalidation of the repealed

statute would not serve the purpose of preventing future prosecutions under a constitutionally defective standard." (107 S.Ct. 1921.) In the instant case, the jury returned its finding of death nearly five months prior to the California Supreme Court's determination in Robertson, supra, that the reasonable doubt instruction should be presented at the capital penalty phase under the current death penalty statute.[3] Moreover, the Robertson holding has been applied retroactively to capital cases in this State, and was in fact so applied in the instant case. Thus, it is clear that, as in Pope v. Illinois, supra, no action on the part of this Court in the instant case, or in any other California case, is necessary in order to prevent future capital penalty determinations "under a constitutionally defective standard." (Pope v. Illinois, supra, 107 S.Ct. 1921.)

An additional observation based upon the holding in Pope v. Illinois, supra, is appropriate at this point. In particular, this Honorable Court remanded the matter to the Illinois Court of Appeals so that the "harmless-error issue" could be considered by the state tribunal. (107 S.Ct. 1923.) In Pope v. Illinois, as in Rose v. Clark (1986) 478 U.S._____, 106 S.Ct. 3101, instructional error occurred during the guilt trial of a criminal offense; indeed, Rose v. Clark involved a murder prosecution. Nevertheless, this Court held in both of the above cases that there was no "reason to retry the defendant if the facts that the jury necessarily found established guilt beyond a reasonable doubt." (Pope v. Illinois, supra, 107 S.Ct. at p. 1922.) If harmless error analysis is permitted in situations in which instructional error has occurred during the guilt trial in a criminal prosecution, then a fortiori, such analysis must be applicable to penalty determinations, such as the one now at issue. As noted previously, the Supreme Court of California

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3. The penalty finding was returned by the jury in the instant case on July 23, 1982, while People v. Robertson, supra, was decided by the California Supreme Court on December 10, 1982.

determined in its opinion that the instructional error now complained of 'could not have affected the jury's consideration of the other crimes evidence.' (Petn. Appendix, A., p. 53.)[4] It will be recalled that petitioner has framed the instant issue solely in terms of the necessity for instruction in the trial court, and has not attacked the California Supreme Court's harmless error resolution at all in his argument. Thus, respondent submits, even assuming arguendo that petitioner's argument were meritorious, which it is not, the result of its successful assertion would be, at best, a remand for a state-conducted harmless error analysis or, if that analysis had been already performed, as it was in the instant case, review of the latter question by this Honorable Court. (Pope v. Illinois, supra, 107 S.Ct. 1922-1923.)

Even under these suppositions, which respondent submits are overly favorable to petitioner, the Petition For Writ of Certiorari should be denied. Petitioner has simply failed to undermine, or even to address seriously, the harmless error analysis performed by the California Supreme Court in resolving petitioner's state appeal. Given the nature of the jury's true function at the penalty phase--to determine the appropriate punishment for petitioner based upon the facts adduced during the guilt phase and the evidence produce at the penalty phase--the California Supreme Court's resolution of the issue of prejudice should and must be given great weight by this Court. Thus, even assuming for the sake of argument that the reasonable doubt standard were to be constitutionally applicable to penalty phase evidence of other crimes in California capital cases, no error requiring reversal has been alleged by petitioner in this regard.

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4. It will be noted that this conclusion is actually more favorable to the judgment below than that mandated under Chapman v. California (1967) 386 U.S. 18, 24, which requires only a demonstration of harmlessness beyond a reasonable doubt.

III

PETITIONER WAS DEPRIVED OF NO FEDERALLY GUARANTEED RIGHT BY THE CALIFORNIA SUPREME COURT'S DETERMINATION THAT THE REASONABLE DOUBT STANDARD'S APPLICABILITY TO PENALTY PHASE EVIDENCE RESTS UPON STATE GROUNDS ALONE

Relying upon the observation that the reasonable doubt standard has long been applied in California to other crimes evidence admitted for the purpose of penalty determination in capital trials, petitioner argues that the California Supreme Court violated his federal constitutional rights in holding that this determination is predicated solely upon state law. (Petn. p. 14.) In its opinion in the instant case, the Supreme Court of California held it to be 'implicit in our decision [in People v. Robertson, supra, 33 Cal.3d 21] that the rule [establishing the standard of proof now at issue] is an evidentiary one and is not constitutionally mandated.' (Petn. Appendix A, p. 51.) Clearly, what petitioner is attempting to do by way of the instant argument and through citation to such cases as Hicks v. Oklahoma (1980) 447 U.S. 343, and Vitek v. Jones, supra, (1980) 445 U.S. 480 is to equate the result in petitioner's appeal before the California Supreme Court with the type of 'arbitrary deprivation by the State' of a protected liberty interest condemned in Hicks and Vitek. (Hicks v. Oklahoma, supra, 447 U.S. 346, 347; Vitek v. Jones, supra, 445 U.S. 480, 488-489.) Respondent submits that these attempts are in vain.

The most important observation which respondent can offer with respect to petitioner's final assertion is that no deprivation, arbitrary or otherwise, on the part of the State of California in fact occurred in the instant case. The simple fact is that the continuity of California decisions requiring the reasonable doubt standard in penalty phase adjudication involving other crimes evidence remains unbroken, and was, under the holding in People v. Robertson, supra, as well as the instant

opinion, in effect at the time of petitioner's trial. That is to say that the State of California, under these decisions did in fact require the meeting of the reasonable doubt standard with respect to other crimes evidence at the penalty phase and also instruction to the jury to that effect. Petitioner's appeal, as well as the instant petition, is predicated not upon an overruling of these cases or a statutory revision in the standard to be applied, but rather upon acknowledged error on the part of the trial court in failing to render the required instructions at the time of petitioner's penalty trial. To this extent, then, it is clear that if petitioner has failed thus far to allege a federally cognizable constitutional issue with respect to the two arguments discussed above, he cannot prevail upon the instant assertion, since even under the cases cited by petitioner in this regard, no deprivation of a procedural right as a matter of state law ever occurred in the instant case.

Petitioner's argument under the instant rubric is broader than its caption suggests. Essentially, he argues that his federally guaranteed rights to due process and equal protection were violated when the California Supreme Court "failed "to follow its own precedents" in determining that the error which occurred with respect to the reasonable doubt instruction at the penalty phase was harmless. (Petn. pp. 14-15.) In the time interval between the earliest case cited by petitioner in this regard (People v. Terry (1964) 61 Cal.2d 137, 390 P.2d 381, and the opinion by the California Supreme Court in the instant case, numerous changes in state and federal capital case law took place, as well as significant statutory changes within California. It would appear that petitioner is suggesting that rules of procedure and review, once arrived at within a particular substantive context, are etched in stone for future generations. Such is clearly not the course of the law in California or in the United States.

Again, what petitioner is complaining of is not the fact that the California Supreme Court withdrew petitioner's right to the reasonable doubt standard, because as noted above this did not in fact occur. What petitioner is actually arguing is that a reversal per se standard was at one time applicable to the type of error which occurred in petitioner's trial, and that for this reason it must be applied today. Respondent has already argued that even assuming arguendo the error which occurred at petitioner's trial countervened federal constitutional requirements, the usual standard of federal harmless error would be applicable. (See Argument II above.) It would be ironic to say the least if petitioner were able to achieve reversal per se by denigrating his claim from an assertion of selectively incorporated applicability of Fourteenth Amendment procedural due process rights to an assertion of residual due process protections as per Hicks and Vitek, supra.

Petitioner's equal protection argument is, if anything, on weaker footing. Petitioner simply argues that by "failing to require that the reasonable doubt instruction be given in the penalty phase of this case, petitioner was accorded different treatment than that which has traditionally protected capital defendants in this jurisdiction." (Petn. p. 17.) As previously noted, neither the Legislature nor the Supreme Court of California ever abrogated the reasonable doubt standard with respect to penalty phase other crimes evidence in capital cases. The requirement was in effect at the time of petitioner's penalty phase trial under the holding of People v. Robertson, supra, and remains in effect today. The fact that the trial court erred in failing to anticipate the Robertson holding in terms of the continued requirement does not change this result in the slightest. Moreover, equal protection analysis has always required that individuals or groups being considered under the analysis be similarly situated. Even assuming arguendo that

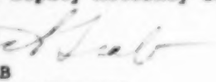
there were some marginal validity to petitioner's procedural assertions, the fact remains, as noted above, that the statutory provisions governing the procedural aspects of capital cases in California have changed substantially over the years. There is simply no reason to assume, as petitioner does, that he is similarly situated with respect to all other "capital defendants in this jurisdiction." (Petn. p. 17.)

CONCLUSION

For the foregoing reasons, respondent respectfully submits that the Petition For Writ of Certiorari should be denied.

DATED: April 20, 1988.

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DECLARATION OF SERVICE BY MAIL

Re: ADAM MIRANDA V. THE PEOPLE OF THE STATE OF CALIFORNIA No. 87-6746

I am over 18 years of age, and not a party to the within cause; my business address is 3580 Wilshire Boulevard, Los Angeles, California 90010; I served a copy of the attached

BRIEF OF RESPONDENT IN OPPOSITION

on each of the following, by placing same in an envelope(s) addressed as follows:

Three copies to:

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State of California
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Honorable Frank S. Zolin
County Clerk/Executive Officer
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Los Angeles, California 90012
FOR DELIVERY TO:
Hon. Kathleen Parker, Judge

Curt Hazell
Deputy District Attorney
210 West Temple Street
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Each said envelope was then, on May 4, 1988, sealed and deposited in the United States Mail at Los Angeles, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 4, 1988, at Los Angeles, California.

FG:lg
LAB3XS0026

Josephine D. Lee
Declarant

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